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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Subject: **Case M.9449 – VAG / VARTA (CONSUMER BATTERY, CHARGERS AND PORTABLE POWER AND LIGHTING BUSINESS)**
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 14 October 2019**,** the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Varta Aktiengesellschaft ('VAG', Germany) will acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, a part of Energizer Holdings, Inc. ('Energizer', USA) (the 'Transaction').

[1] OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (the 'TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

[2] OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

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(2) The Transaction takes place as a result of a prior notification to the Commission of a proposed concentration between Energizer and Spectrum Brands Holdings, Inc.. By decision of 11 December 2018, adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation, the Commission declared that concentration between Energizer and Spectrum compatible with the internal market and the EEA Agreement (the 'Energizer/Spectrum Decision')[3], subject to full compliance with the commitments annexed to that decision (the 'Energizer/Spectrum Commitments'). Pursuant to the Energizer/Spectrum Commitments, Energizer committed to divest certain assets ('the Divestment Business' or 'the Target').

(3) VAG is referred to in the decision as the 'Notifying Party', and VAG and the Divestment Business together are referred to together as the 'Parties'.

1. THE PARTIES

(4) VAG, via its subsidiary Varta Microbattery GmbH ('Varta Microbattery', Germany), manufactures and supplies microbatteries, and via its subsidiary Varta Storage GmbH ('Varta Storage', Germany), manufactures and supplies energy storage devices for private households, customer-specific, large-scale storage applications as well as energy solutions for customer-specific and standardised lithium-ion batteries. VAG is active on an EEA-wide and global basis.

(5) The Divestment Business comprises of Spectrum's former Varta consumer battery, chargers and portable power and lighting business in the EMEA region, as detailed in the Energizer/Spectrum Commitments. The structure and entities constituting the Divestment Business are shown in Figure 1.

Figure 1 - Divestment Business (circulated in blue)[4]

[…]

(6) The Divestment Business does not include the Rayovac hearing aid batteries ('HABs') business that Energizer acquired from Spectrum in the Spectrum Transaction. The Divestment Business will have the benefit of a […] exclusive supply arrangement for Rayovac-branded HABs specifically for the mass retail channel (HABs Supply Agreement), pursuant to the HABs re-branding remedy that was approved by the Commission in the Spectrum Decision.

2. THE OPERATION AND THE CONCENTRATION

(7) Pursuant to a binding Acquisition Agreement entered into between VAG and Energizer on 29 May 2019, VAG will acquire the Divestment Business by way of

3 M.8988 – *Energizer/Spectrum Brands.*

4 Form CO, paragraph 28.

purchase of shares. VAG will thus acquire sole control over the Divestment Business that prior to the Transaction constitutes a part of Energizer.

(8) The operation thus constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(9) The Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation.

(10) On 9 August 2019, the Notifying Party informed the Commission, by means of a reasoned submission under Article 4(5) of the Merger Regulation, that the concentration is capable of being reviewed under the national competition laws of at least three Member States (namely Austria, Germany, Poland, Romania and Spain) and requested that it should be examined by the Commission.

(11) The Commission transmitted this reasoned submission to all Member States on 9 August 2019. The Member States competent to examine the concentration under their national competition law did not express their disagreement to the request for referral within 15 working days.

(12) The Transaction is therefore deemed to have a Union dimension pursuant to Article 4(5) of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

4.1. Introduction

(13) Batteries are devices that store electrical energy by means of a chemical interaction between a negative electrode (anode) and a positive electrode (cathode) through a conductive material (electrolyte). The resulting electricity can be used to power a wide range of devices or installations.[5]

(14) The overall battery industry encompasses different categories: (i) industrial batteries, (ii) automotive batteries, (iii) batteries that are directly integrated into consumer devices and (iv) batteries used in relatively small devices (e.g. power tools and toys).[6]

- Consumer batteries can be distinguished based on their size and overall purpose:

- Household batteries: common battery sizes such as AA and AAA typically used to power various types of household electric devices. These household

[5] M.8988 – *Energizer/Spectrum Brands*, paragraph 7.
[6] M.8988 – *Energizer/Spectrum Brands*, paragraph 8.

batteries can be (i) disposable (primary), if manufactured for example according to an alkaline or lithium chemistry, or (ii) rechargeable (secondary) if manufactured according to a chemistry that allows recharging (e.g. nickel-metal hydride (NiMH));

- Specialty batteries: batteries that have a coin or a button shape, are most commonly manufactured with chemistries such as lithium and are typically used for electronic watches and photo equipment; and

- Hearing air batteries ('HABs'): batteries used to power hearing aid devices which are very small button-cell shaped specialty batteries that are most commonly manufactured with a zinc-air chemistry.[7]

(15) The Parties are active in a number of markets; however, since their activities are to a large extent complementary, the resulting overlaps are limited. From a horizontal perspective, the Parties overlap in the wholesale supply of speciality batteries, and more specifically in the wholesale supply of primary alkaline coin batteries to the original equipment manufacturer ('OEM') channel. With respect to vertical links, VAG is active in the upstream market for manufacturing and wholesale supply of white label[8] HABs to battery brands, while the Divestment Business is active in the downstream market of wholesale supply of branded HABs to the mass retail channel.

4.2. Market for the wholesale supply of branded primary alkaline coin batteries to OEMs

4.2.1. Market definition

4.2.1.1. Relevant product market

(16) In the recent *Energizer/Spectrum* case, the Commission concluded that consumer batteries[9] sold to the OEM channel are part of a product market, separate from that of consumer batteries sold to the retail channel.[10] The Commission also considered that consumer batteries sold to the OEM channel should be distinguished according to their rechargeability (*primary batteries* that are not rechargeable and *secondary batteries* that are rechargeable), to their shape (cylinder or coin), and to their chemistry (alkaline, lithium, silver oxide, zinc carbon, etc).[11] With respect to the distinction between branded and private label consumer batteries, the Commission

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7 M.8988 – *Energizer/Spectrum Brands*, paragraph 9.

8 In this context, the word 'white label' refers to HAB produced by VAG and re-branded by other battery companies.

9 For the purpose of the present Decision, the expression 'consumer batteries' is used interchangeably with the expression 'household and specialities batteries'.

10 M.8988 – *Energizer/Spectrum Brands*, paragraph 34.

11 M.8988 – *Energizer/Spectrum Brands*, paragraph 57.

concluded that branded consumer batteries are in a separate product market, distinct from private label consumer batteries.[12]

(17) The market investigation has not yielded any information that would speak against applying the same segmentation in this case as the one used in *Energizer/Spectrum*.

(18) The Commission therefore considers that the conclusions referred to in paragraph (16) above apply in this case.as well and that the wholesale supply of branded primary alkaline coin batteries to OEMs constitutes a distinct relevant product market.

4.2.1.2. Relevant geographic market

(19) In the recent Energizer/*Spectrum* case, the Commission concluded that the wholesale supply of consumer batteries (including its various segmentations)[13] to the OEM channel is EEA-wide in geographic scope.[14]

(20) The market investigation has not yielded any information that would speak against the applying the same market definition in this case as the one used in *Energizer/Spectrum*.

(21) The Commission therefore considers that the conclusions referred to in paragraph (19) above apply in this case as well and that the geographic scope of the relevant market is EEA-wide.

4.2.2. Competitive assessment

(22) The present section demonstrates that post-Transaction the Merged Entity will have limited market share in the market for the wholesale supply of branded primary alkaline coin batteries to OEMs and that a number of credible suppliers would continue to compete with the Merged Entity.

(23) First, the combined market share of VAG and the Divestment Business is small to moderate and market share increments are limited. As shown in Table 1, the Parties and in particular the Divestment Business have low or moderate market shares in the market for wholesale supply of primary alkaline coin batteries to OEMs. In 2018, the Parties' combined market share in the EEA has been [10-20]% in volume and [30-40]% in value. Therefore, if only market shares in volume had to be considered, the market for wholesale supply of primary alkaline coin batteries to OEMs would not be an affected market under the terms of Commission Regulation No 802/2004.[15] With regard to market shares in value, the Transaction would only lead to a small market share increment (the Divestment Business only holds [0-5]% of the market) despite the fact that the Parties' combined market share in 2018 has been [30-40]%.

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12 M.8988 – *Energizer/Spectrum Brands*, paragraph 74.

13 For the purpose of the present Decision, the expression 'consumer batteries' is used interchangeably with the expression 'household and speciality batteries'.

14 M.8988 – *Energizer/Spectrum Brands*, paragraph 127.

15 OJ L 133, 30.4.2004, p. 1 (the 'Implementing Regulation').

Table 1 The Parties' EEA sales and market shares expressed in volume and in value

Year	Value						
	Divestment Business		VAG		Combined		Total market size
	EUR	%	EUR	%	EUR	%	EUR
2018	[…]	[0-5]%	[…]	[30-40]%	[…]	[30-40]%	[…]
2017	[…]	[5-10]%	[…]	[5-10]%%	[…]	[10-20]%	[…]
2016	[…]	[5-10]%	[…]	[10-20]%	[…]	[20-30]%	[…]
	Volume						
	Divestment Business		VAG		Combined		Total market size
	Units	%	Units	%	Units	%	Units
2018	[…]	[0-5]%	[…]	[10-20]%	[…]	[10-20]%	[…]
2017	[…]	[0-5]%	[…]	[5-10]%	[…]	[5-10]%	[…]
2016	[…]	[0-5]%	[…]	[5-10]%	[…]	[5-10]%	[…]

Source: Form CO, paragraph 82.

(24) Second, a multitude of alternative suppliers remain in the market. Consistent with the Commission's finding in *Energizer/Spectrum*,[16] market participants indicated that a number of suppliers would remain available to European OEMs after the Transaction.[17] These include, for example, Duracell, Panasonic, Gold Peak, Sony (now Murata), Philips, Agfa, Kodak, Toshiba, FDK (Fujitsu), Ansmann, Cegasa, Emos, Maxell, Camelion, Renata, Powercell, and Airam.

(25) Moreover, based on submission by the Notifying Party, entry into the market by new suppliers is not difficult. In particular, according to the Notifying Party, consumer batteries are low-cost commoditised products for which European manufacturers would not be competitive with Asian manufacturers. Consequently, not only the Parties, but also a number of other battery suppliers purchase consumer batteries from Asian manufacturers and sell them to OEMs after appropriate labelling and packaging.[18]

16 M.8988 – *Energizer/Spectrum Brands*, paragraph 10.

17 See for example, minutes of a call with a competitor, paragraph 8.

18 As explained in the Form CO, paragraph 106, the Parties manufacture only silver oxide cells.

(26) Third, overall market concentration is moderate. The Parties provided estimates of market shares of their three largest competitors, namely of Golden Peak, Chung Pak and Golden Power (Table 2). The modest market shares of these three largest competitors, together with the large number of competitors active in this market, are indicators that the market concentration is low and a number of battery companies are able to exert competitive constraints to one another.

Table 2 Market shares (expressed in volume and in value) of the Parties three largest competitors

Year	Value		
	Gold Peak	**Chung Pak**	**Golden Power**
2018	[10-20]%	[5-10]%	[0-5]%
2017	[10-20]%	[5-10]%	[0-5]%
2016	[10-20]%	[5-10]%	[0-5]%
	Volume		
	Gold Peak	**Chung Pak**	**Golden Power**
2018	[10-20]%	[5-10]%	[0-5]%
2017	[10-20]%	[5-10]%	[0-5]%
2016	[10-20]%	[5-10]%	[0-5]%

Source: Form CO, paragraph 92.

4.2.3. Conclusion on wholesale supply of primary alkaline coin batteries to OEMs

(27) For the reasons explained in Section 4.2.2, and considering all evidence available to it, the Commission concludes that the Transaction does not give rise to any competition concerns related to the wholesale supply of primary alkaline coin batteries to OEMs.

4.3. Hearing Aid Batteries ('HABs')

4.3.1. Activities of the Parties

(28) VAG manufactures and supplies HABs to battery brands in the EEA and world-wide. VAG is also active downstream in the wholesale supply of HABs (both branded and non-branded) to the audiologist channel. VAG is not directly active in the wholesale supply of HABs to the mass retail channel.[19]

(29) The Divestment Business is active in the wholesale supply of HABs (both branded and non-branded) to the retail mass channel through the Rayovac brand, formerly belonging to Spectrum. The Divestment Business does not manufacture HABs and

[19] VAG is not directly present in the market for the supply of branded HAB to the mass retail channel. For completeness, Auditas makes some negligible sales […] of Ecopack-branded HAB to a third party distributor who then resells to smaller mass retail outlets in Germany.

has a supply agreement with Energizer, which committed in the Energizer/Spectrum Commitments to supply HABs to the Divestment Business, for sale under the Rayovac brand, […] for […] (extendable for up to […] at the request of the purchaser).

(30) The Transaction gives rise to no horizontal overlaps. However, it gives rise to a vertical relationship and a vertically affected market between (i) VAG's upstream activities in manufacturing and supplying white label HABs to battery brands, and (ii) the Divestment Business' downstream activities in the wholesale supply of branded HABs to the mass retail channel.

4.3.2. Market definitions

4.3.2.1. Relevant product markets

(a) Upstream market: Market for the manufacturing and wholesale supply of white label HABs to battery brands

(31) In the recent *Energizer/Spectrum* case, the Commission concluded that HABs belong to a product market that is separate from other types of batteries.[20] The Commission concluded that branded and private label consumer batteries are not part of the same product market.[21] Finally, the Commission further concluded that the wholesale supply of branded HABs to the mass retail channel constitutes a distinct product market (as opposed to e.g. wholesale to the audiologist channel).[22]

(32) The Notifying Party agrees that HABs constitute a distinct category of batteries. Further, the Notifying Party submits that the manufacturing and wholesale supply of white label HABs to battery brand businesses constitutes a distinct relevant product market, separate from the downstream markets for the wholesale supply of branded batteries to the mass retail or audiologist channel.[23]

(33) The market investigation has not yielded any information that would speak against defining, in line with what has been done in the *Energizer/Spectrum* decision, distinct markets for HABs compared to other batteries or as to the distinction between branded and private label batteries.

(34) The results of the market investigation and the information available to the Commission further support the claim of the Notifying Party that the manufacture and wholesale supply of white label HABs to battery brands constitutes a distinct relevant product market.

(35) First, the requirements of battery brand businesses are different from the downstream customers they serve. In practice, the demand for white label HABs by battery brand

20 M.8988 – *Energizer/Spectrum Brands*, paragraph 96, 114 and 135.
21 M.8988 – *Energizer/Spectrum Brands*, paragraph 74, 114 and 135.
22 M.8988 – *Energizer/Spectrum Brands*, paragraph 106, 114 and 135.
23 Form CO, paragraph 65.

businesses is essentially based not on brands but on the technical qualities of the batteries supplied and the commercial terms (such as price) on which they are supplied. This is in contrast to the demand of (branded) HABs in the mass retail (or audiologist) channel where branding plays a role.[24]

(36) Second, the structure of demand is different. The number of customers is different and different entities are customers in the supply of white label HABs to battery brands compared to the customers for such branded batteries in the downstream markets that the battery brand businesses serve. There are but a limited number of brand businesses, namely Duracell and a few others, which make up the demand for HABs in the supply of white label HABs to battery brands in the EEA (or globally). In contrast, in the supply of branded HABs to for example the mass retail channel (or audiologist channel) there is a multitude of different customers in the EEA (or even nationally).

(37) Third, from a supply side-perspective, the manufacture and wholesale supply of white label HABs to battery brands requires production facilities for HABs. That is in contrast to the brand businesses that do not need manufacturing equipment but acquire the batteries from the manufacturers (either captively or from third parties). At the same time, a manufacturer of HABs would find it difficult to supply the batteries directly in the wholesale of branded HABs to the mass retail (or audiologist) channel if it did not have a brand to do that.[25]

(38) Therefore, the Commission concludes that the market for the manufacturing and wholesale supply of white label HABs to battery brands constitutes a distinct relevant product market.

(b) Downstream market: Market for the wholesale supply and distribution of branded HABs to the mass retailer channel

(39) In the recent *Energizer/Spectrum* case, the Commission concluded that HABs constitute a separate relevant product market, distinct from other consumer batteries.[26] The Commission also concluded that the supply of HABs to the mass retail channel (that is traditional retailers such as grocery stores, do-it-yourself stores and other consumer retail stores where a range of consumer products are made available) constitutes a separate relevant product market, distinct from supply to the specialist hearing aid retail channel (e.g. audiologists).[27] Moreover, the Commission concluded that branded and private label consumer batteries are not part of the same product market.[28]

(40) The Notifying Party agrees with the finding of a distinct market for the wholesale supply of branded HABs to the mass retail channel.

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24 See for example minutes of a call with a market participant.
25 See for example minutes of a call with a market participant.
26 M.8988 – *Energizer/Spectrum Brands*, paragraph 96, 114 and 135.
27 M.8988 – *Energizer/Spectrum Brands*, paragraphs 106, 114 and 135.
28 M.8988 – *Energizer/Spectrum Brands*, paragraph 74, 114 and 135.

(41) The market investigation has not yielded any information that would speak against defining, in line with what has been done in *Energizer/Spectrum*, a distinct market for the wholesale supply of branded HABs to the mass retail channel.

(42) The Commission therefore considers that the conclusions reached in *Energizer/Spectrum* and referred to in paragraph (39) apply for the purposes of this case as well and that the wholesale supply of branded HABs to the mass retail channel constitutes a distinct relevant product market.

4.3.2.2. Relevant geographic markets

(a) Upstream Market: Market for the manufacturing and wholesale supply of white label HABs to battery brands

(43) The Notifying Party submits that the market for manufacturing and wholesale supply of white label HABs to battery brands is global in geographic scope. In support of its submission, the Notifying Party explains that there are significant trade flows and that a large part of the HABs it manufactures in its plant in Germany is exported outside the EEA to customers that are typically active globally and have headquarters outside the EEA.[29]

(44) The results of the market investigation nonetheless suggests that geographic markets are not necessarily global but that the market could be EEA-wide in scope. In particular, EEA-customers' quality expectations are to a certain extent higher than in other regions, which is reflected by the fact that certain Asian suppliers are currently not able to produce the quality required by customers in the EEA.[30]

(45) In any event, it is not necessary for the purposes of this decision to conclude on the exact scope of the relevant geographic market for the manufacture and wholesale supply of HABs to battery brands as the outcome of the competitive assessment remains the same regardless of whether a global or EEA-wide market was considered.

(b) Downstream: Market for the wholesale supply and distribution of branded HABs to the mass retailer channel

(46) In the recent Energizer/ Spectrum case, the Commission concluded that the market for the wholesale supply of branded HABs to the mass retail channel is national in scope.[31]

(47) The market investigation has not yielded any information that would speak against defining, in line with what has been done in *Energizer/Spectrum*, the market as national in scope.

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29 Form CO, paragraphs 75–78.

30 See for example replies to question 7 of Questionnaire to Battery Companies.

31 M.8988 – *Energizer/Spectrum Brands*, paragraphs 125.

(48) The Commission therefore considers that the conclusions reached in *Energizer/Spectrum* and referred to in paragraph (46) apply for the purposes of this case as well and that the market for the wholesale supply of branded HABs to the mass retail channel is national in scope.

4.3.3. Market structure and market shares

(a) Upstream market: Market for the manufacturing and wholesale supply of white label HABs to battery brands.

Table 3 VAG's sales and market shares in the market for manufacturing and supplying HABs to EEA battery brands

Manufacturing and wholesale supply of HABs to EEA battery brands						
Year	VAG				Total market	
	Value ('000 EUR)	Market share (value)	Volume ('000 units)	Market share (volume)	Value ('000 EUR)	Volume ('000 units)
2018	[…]	[90-100]%	[…]	[90-100]%	[…]	[…]
2017	[…]	[90-100]%	[…]	[90-100]%	[…]	[…]
2016	[…]	[90-100]%	[…]	[90-100]%	[…]	[…]

Source: Form CO, paragraph 91.

(49) The Commission observes that VAG has a monopoly in the manufacture and supply of HABs to battery brands in the EEA. Moreover, even if a potential global market was considered, VAG's market share would be very high at [80-90]%, based on the Notifying Party's own submission.

(50) There are currently only two main manufacturers of HABs worldwide, Energizer and VAG (in addition to certain Asian manufacturers that do not supply in the EEA, see recitals (63) to (64)). Energizer is vertically integrated and it both manufactures HABs and supplies them directly to the mass retail channel under its own brands. Nonetheless, Energizer does not supply HABs to other brand businesses active in the wholesale supply of branded HABs to the mass retail channel (see recitals (60) to (62). Therefore, pre-transaction, VAG is the main supplier worldwide, and the only one in the EEA, of HABs to other battery brands.

(51) Pre-Transaction, VAG has been supplying HABs to all main non-vertically integrated players active in the downstream markets for the wholesale supply and distribution of HABs, including Duracell, Panasonic, Renata and Sony.

(52) Until now, VAG was supplying HABs to the mass retail channel on a private label basis but would, after the Transaction, compete on the branded downstream mass retail market.

(b) Downstream market: Market for the wholesale supply and distribution of branded HABs to the mass retailer channel

(53) VAG is currently not present on the downstream market for the wholesale supply of branded HABs to the mass retail channel. Nonetheless, the Divestment Business is present on this market with the Rayovac brand that accounted for [30-40]% of the market in value and [20-30]% in volume in the EEA in 2018 as shown, in Table 4 below.

Table 4 Divestment Business' and competitors' market shares by value and volume in the market for the wholesale supply and distribution of branded HABs to the mass retailer channel

Wholesale supply of branded HABs to the mass retail channel													
		Divestment Business through Rayovac Brand		Energizer		Duracell		Panasonic		Sony		Others	
	Year	Value	Volume	Value	Volume	Value	Volume	Value	Volume	Value	Volume	Value	Volume
EEA	2018	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%	[20-30]%
	2017	[30-40]%	[30-40]%	[20-30]%	[10-20]%	[20-30]%	[30-40]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%
	2016	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%

Source: Form CO, paragraphs 94 and 98.

(54) At the national level, the Divestment Business is present across the EEA through the Rayovac brand. Market shares in the various EEA countries are shown in Table 5 below.

Table 5 Divestment Business market shares by value and volume in the market for the wholesale supply of branded HABs to the mass retailer channel at national level in 2018.

Wholesale supply of branded HAB to the mass retail channel						
	Value			**Volume**		
	Target sales in EUR	**Total market**	**Market share**	**Target sales in units**	**Total market**	**Market share**
Austria	[...]	[...]	[50-60]%	[...]	[...]	[40-50]%
Belgium	[...]	[...]	[10-20]%	[...]	[...]	[10-20]%
Bulgaria	[...]	[...]	[90-100]%	[...]	[...]	[90-100]%
Croatia	[...]	[...]	[90-100]%	[...]	[...]	[90-100]%
Cyprus	[...]	[...]	[10-20]%	[...]	[...]	[5-10]%

Czech Republic	[...]	[...]	[30-40]%	[...]	[...]	[50-60]%
Denmark	[...]	[...]	[0-5]%	[...]	[...]	[10-20]%
Finland	[...]	[...]	[50-60]%	[...]	[...]	[50-60]%
France	[...]	[...]	[50-60]%	[...]	[...]	[40-50]%
Germany	[...]	[...]	[20-30]%	[...]	[...]	[20-30]%
Greece	[...]	[...]	[0-5]%	[...]	[...]	[0-5]%
Hungary	[...]	[...]	[60-70]%	[...]	[...]	[70-80]%
Iceland	[...]	[...]	[90-100]%	[...]	[...]	[90-100]%
Ireland	[...]	[...]	[30-40]%	[...]	[...]	[40-50]%
Italy	[...]	[...]	[70-80]%	[...]	[...]	[70-80]%
Luxembourg	[...]	[...]	[90-100]%	[...]	[...]	[90-100]%
Malta	[...]	[...]	[30-40]%	[...]	[...]	[40-50]%
Netherlands	[...]	[...]	[90-100]%	[...]	[...]	[80-90]%
Norway	[...]	[...]	[40-50]%	[...]	[...]	[40-50]%
Poland	[...]	[...]	[60-70]%	[...]	[...]	[70-80]%
Portugal	[...]	[...]	[5-10]%	[...]	[...]	[5-10]%
Romania	[...]	[...]	[20-30]%	[...]	[...]	[30-40]%
Slovakia	[...]	[...]	[50-60]%	[...]	[...]	[70-80]%
Slovenia	[...]	[...]	[90-100]%	[...]	[...]	[90-100]%
Spain	[...]	[...]	[50-60]%	[...]	[...]	[60-70]%
Sweden	[...]	[...]	[10-20]%	[...]	[...]	[5-10]%
UK	[...]	[...]	[10-20]%	[...]	[...]	[10-20]%

Source: Form CO, paragraph 94.

4.3.4. Competitive assessment: input foreclosure

4.3.4.1. Ability to foreclose

(55) According to the Non-horizontal Mergers Guidelines[32], vertical mergers can lead to competition concerns if the parties to this concentration (the 'merged entity') have a significant degree of market power in the upstream market.[33] In this case, a reduced access of upstream products and services might negatively affect the availability of inputs for the downstream market.[34]

(56) The Commission considers that VAG would have the ability to foreclose its downstream competitors in the supply of branded HABs to the mass retail channel from their access to HABs (input foreclosure).

(57) First, VAG has a significant market position in the upstream market for the supply of white label HABs to battery brands. As noted in Section 4.3.3, in the EEA VAG is the only manufacturer of HABs active in supplying HABs to battery brands. Further, even if considering a potential global upstream market, its market share in 2018 would be very high at [80-90]% in revenue and in [80-90]% in volume.[35]

(58) This suggests that VAG's market power is not limited to the EEA, but is rather global. Also, as will be explained in paragraph (64), there is a certain degree of product differentiation for HABs, and battery brands consider that the HABs produced by the VAG and Energizer are of superior quality, compared to Asian manufacturers. Therefore, even if the Asian suppliers have some but limited market share globally, the competitive constraint to VAG that they present is likely less than what their (already limited market share) suggests.

(59) Second, for the battery brand businesses active in wholesale supply of branded HABs to the mass retail channel, the supply of HABs is essential; they do not have the manufacturing capabilities to produce HABs. Battery brands leverage their brand image in consumer batteries to distribute their branded HABs to retailer but are entirely dependent on VAG for the supply of HABs.

(60) Third, it is not likely that Energizer would become a significant merchant supplier of white label HABs battery brands. Energizer, which also manufactures HABs and supplies them in the EEA, uses most of the manufactured HABs captively for its downstream businesses. The Notifying Party claims that Energizer […] and that Energizer […] . According to the Notifying Party, Energizer has also […]. Furthermore according to the Notifying Party Energizer already supplied […] with

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32 Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6 ('Non-Horizontal Merger Guidelines').

33 Non-horizontal Mergers Guidelines, paragraph 35.

34 Non-horizontal Mergers Guidelines, paragraph 36.

35 Form CO, paragraph 91.

approx. […] units of white label HABs at the global level (though not in the EEA) in the year 2018.[36]

(61) Nonetheless, the results of the market investigation show that none of the downstream market participants have changed their HABs supplier in the last five years.[37] In addition, referring to potential supply from another HABs manufacturers, a market participant explained that former Rayovac-Spectrum (now Energizer) indicated a lack of interest in supplying high quality batteries equivalent to those supplied by VAG. A customer explained, *'We had a contact with Rayovac but its HAB didn't meet our requirements.'*[38] A market participant also explained that Rayovac was not willing to supply the highest quality batteries *'The only alternative supplier of HAB of similar quality of VAG is Spectrum/Rayovac. However, Spectrum indicated a lack of interest in supplying HAB to the Company the required quality products. Specifically, these negotiations fell through because they only offered an inferior product (not of their best quality and below [name of market participant]'s standards)'*.[39]

(62) Therefore, it appears that Energizer if anything is likely not a supplier that downstream customers could turn to in order to avoid input foreclosure efforts by VAG.

(63) Fourth, HABs manufacturers established outside the EEA do not represent a viable source of supply or competitive constraint on VAG in the supply of white label HABs to battery brands.

(64) Such suppliers make currently no sales in the EEA and, even if considering the global level, their market shares are limited. Moreover, the results of the market investigation suggest that these suppliers – mainly Chinese – are not able to deliver sufficient quality to be considered as viable alternative. A market participant explains: *'[t]he HAB batteries manufactured by Rayovac and VAG are by far of superior performance and quality and reliability in comparison with other products. Asian manufacturers able to supply HAB today, cannot match the battery performance and experience important quality issues in terms of leakage and battery cells corrosion.'*[40] Another market participant concurs: *'We think HAB produced by VAG and Rayovac have better quality than those produced by Chinese manufacturers.'*[41] In any event, even if the sales outside the EEA are considered and therefore sales of non-EEA manufacturer in non-EEA countries are considered, VAG's market share in 2018 would be as high as [80-90]% in terms of number of units sold, [80-90]% in terms of revenues.[42]

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36 Form CO, paragraph 223
37 Questionnaire to customers, question 9.
38 Questionnaire to customers, question 10.
39 Minutes of a call with a customer
40 Questionnaire to customers, question 11.
41 Questionnaire to customers, question 11.
42 Form CO, paragraph 87.

(65) With respect to the possibility of Asian suppliers developing their quality, a market participant explained that Asian HABs manufacturers, which already enjoy reasonable economies of scale but lack an acceptable level of quality required in the EEA could develop the capabilities to produce higher quality batteries but that it would only be in the long term: *'In principle, Asian manufacturers that currently produce HAB of lower quality might improve the quality of their HAB, but this of course is not a short-term possibility'*.[43]

(66) Fifth, non-vertically integrated HABs battery brands cannot establish their own production capabilities at competitive terms or within short period of time.

(67) The Notifying Party claims that all its HABs customers used to manufacture HABs batteries and could rebuild their own production lines within 1.5 to 2 years.[44] The Notifying Party nonetheless acknowledges that the reason for these battery brands to have discontinued their HABs production is the lack of economy of scale, which makes the business not economically viable.

(68) Nonetheless, the results of the market investigation indicate that a hypothetical new HABs production line in the EEA would not be economically viable because it would not be able to meet the economies of scales required to be competitive on the market.[45] A market participant explains that developing the upstream capabilities to be able to produce HABs internally is not currently considered as an alternative: *'[t]he Company considers that the investment for becoming a vertically integrated HAB supplier (i.e. to start manufacturing its own HAB battery) is simply not an economically feasible option at the current stage.'*

(69) Furthermore, the Commission notes that even if a downstream competitor to VAG could set up its own production, it would not be adequately immediate to counter the anticompetitive effects of the Transaction. The Commission refers in this respect to the Notifying Party's own submission of it taking 1.5 to 2 years to set up such production capability.

(70) Therefore, the Commission considers that VAG likely has the capability to engage into input foreclosure. Battery brand businesses that supply customers in the EEA are likely not able to turn to alternative suppliers to counter such behaviour by VAG. VAG is currently the only supplier in the EEA. While there globally are a number of other suppliers, their market shares – even combined – are limited and they are likely not able to offer such quality HABs that VAG is and that are required by ultimate customers in the EEA.

4.3.4.2. Incentive to foreclose

(71) According to the Non-horizontal Mergers Guidelines, the incentive of a firm to foreclose its customers depends on the degree to which the foreclosure would be

43 Replies to question 7 of Questionnaire to customers.
44 Form CO, paragraph 92.
45 Minutes with a competitor.

profitable.[46] *'Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream. Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals'*.[47]

(72) The present section demonstrates that the Merged Entity would have an incentive to foreclose battery brands active in the downstream market for wholesale supply and distribution of branded HABs to the mass retailer channel because the profit lost due to a reduction of input sales to these customers would be smaller than the profit gained in the downstream market.

(a) The Notifying Party's argument

(73) The Notifying Party submits that it would not be able to capture an adequate amount of sales at the downstream market to make input foreclosure beneficial to it. According to the Notifying Party, its assumption is that ultimate customers who lose their current HABs brand will purchase from the remaining suppliers (brands) according to their current share in the market. This will lead to a […]% recapture ratio for VAG-Rayovac on the downstream market. The critical recapture ratio defined by the parties as '*the smallest fraction of sales that would need to be recaptured from white label HAB sales to the foreclosed battery brands to Rayovac branded HAB sales in the mass retail channel for the input foreclosure strategy to be profitable for the combined entity*,' would be […]%.

(74) However the Notifying Party claims that the '*[t]he structure of white label supply does not allow targeting foreclosure to a specific geography or channel'* and, as a result, '*[t]he cost of foreclosure is not limited to upstream sales in the EEA as battery brands purchase from VAG through supply agreements negotiated at a global level.*' The Notifying Party then concludes that '*given that about […]% of VAG's white label HAB sales volume to battery brands is in the EEA. Taking this into account, the estimate of the actual recapture rate is about […]*.'

(b) The Commission's assessment

(75) For the following reasons, the Commission considers that VAG would, post-Transaction, likely have the incentive to engage in input foreclosure.

(76) First, as a result of the transaction, VAG will become one of the leading downstream players by holding a [30-40]% market share in value in the distribution of HABs in the mass retail channel in the EEA as a whole, as evidenced in Table 4, with the market share being significantly higher in some Member States. VAG will compete

46 Non-horizontal Merger Guidelines, paragraph 40.

47 Non-horizontal Merger Guidelines, paragraphs 40 and 41.

directly with its customers on the HABs mass retail channel through the Rayovac brand.

(77) Second, the profit margins and absolute profits that the Divestment Business enjoys in the downstream market are significantly higher than those VAG enjoys in the upstream market. This suggests that even a limited recapture at the downstream market would allow the Merged Entity to make up for lost sales and profits at the upstream level that would result from an input foreclosure behaviour. Therefore, the Merged Entity would have an economically-driven incentive to foreclose its customers in the upstream market for manufacturing and supplying HABs to EEA battery brands.

(78) According to the data submitted by the Notifying Party (see Table 6), its absolute margin on the upstream market is EUR […] per unit corresponding to a profit margin of […]% whereas the absolute margin on downstream market is EUR […] per unit corresponding to a profit of […]%.[48] This would give a critical recapture ratio of […]%.[49]. As explained in paragraph (73), this represents the smallest fraction of sales in the mass retail channel that would need to be recaptured by the Merged Entity for the input foreclosure strategy to be profitable.'

Table 6 - Profits and profit margins

	Price	Cost	Abs. profit margin
VAG white label global	[…]	[…]	[…]
Target Rayovac in the EEA mass retail channel	[…]	[…]	[…]

Source: Notifying Party's submission 'Assessing Transaction-specific foreclosure incentives in the supply of HAB's. An Economist's View', Table 1.

(79) Based on information provided by the Notifying Party, if one considers the EEA in isolation, VAG's margin upstream would be even lower. The price per unit would be calculated by dividing EUR […], the value of EEA sales to battery brands in 2018 according to the table in paragraph 91 of the Form CO, by […] the volume of cells associated with those sales. This would result in a price of EUR […] per unit[50] and an absolute margin of EUR […].[51] This would result in a lower critical recapture ratio of […]%.

48 Although the downstream markets are national in scope, in case of input foreclosure, VAG's customers in any EEA country could not acquire HABs from alternative upstream suppliers. Therefore an analysis at EEA-level is conducted.

49 Notifying Party's submission 'Assessing Transaction-specific foreclosure incentives in the supply of HAB's. An Economist's View', section 2.2.

50 This value is obtained by dividing the total EEA sales of EUR […] by the number of units sold in the EEA, which is […].

51 Margin is calculated as the price of EUR […] minus the cost pf EUR […].

(80) The recapture ratio suggested by the Notifying Party is […]%, which is higher than the critical recapture ratios. This suggests that the Merged Entity would be able to earn more at the downstream level following an input foreclosure of its competitors, compared to the losses it would need to incur due to lost sales.

(81) Considering the practical example of the three main battery brand customers of VAG in the EEA, input foreclosure would be profitable based on the figures provided by the Notifying Party. Table 7 shows the margins, quantities and profits that the Merged Entity would likely make with respect to each of the three main battery brand customers of VAG in the EEA.

Table 7 - Additional profit through input foreclosure

(Foreclosure scenario EEA)		[Name of customer]		[Name of customer]		[Name of customer]		Total
	Margin per unit	Quantities	Profit margin	Quantities	Profit margin	Quantities	Profit margin	Profit margin
Upstream ([...] margin)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Downstream ([...] margin)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
- Downstream assuming assuming a […]% recapture	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Additional profit (Assuming a [...] recapture ratio)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Commission's calculations based on the Notifying Party's submission 'Assessing Transaction-specific foreclosure incentives in the supply of HAB's. An Economist's View', and on Form CO, paragraph

(82) For example, if VAG foreclosed Duracell for the supply of white label HABs in Europe it would result in a loss of […] units at a margin of EUR […] per unit resulting in a loss of EUR […] of profit margin. However the recapture ratio calculated by the Notifying Party would imply that […]% of these units would be recaptured by VAG with a margin per unit of EUR […] leading to a profit of EUR […]. Without increasing the price, Duracell foreclosure would lead VAG to make an additional EUR […] almost doubling its profit though this behaviour. This profit would materialise even if the prices in the downstream market were not to increase as a result of the foreclosure.

(83) Third, as explained in section 4.3.4.1 the Merged Entity is the only EEA manufacturer of HABs active in supplying HABs to battery brands and no new entrant is expected in the coming years. As to Energizer – who would have the quality capability required for immediate supplies – it has shown no interest in supplying other HABs brands and, given that it would also benefit from an increase

in the downstream market prices, it is not likely that its incentives would change as a result of the Transaction. There is thus no likelihood of another supplier counteracting an input foreclosure strategy.

(84) It further follows that, were VAG instead of a blocking supplies to increase its prices at the upstream level, customers would likely have no alternative but to either increase their prices at the downstream level – allowing VAG to increase its prices too – or to absorb the additional cost by reducing their own margin.

(85) Fourth, the actual recapture ratio is likely increased by some customers in the wholesale supply of branded HABs in the retail channel requiring suppliers to provide a complete portfolio of products. Therefore, having an HAB brand allows a supplier to bid for more tenders – including those that require a full portfolio of batteries including HABs. A market participant explains: '*Moreover, since VAG would acquire the VARTA/Spectrum portfolio of batteries that are sold in the mass retail channel and it would be competing with the Company for these sales. Indeed, it is important to understand that whereas direct negotiations with several branded battery suppliers are still a common phenomenon in the grocery retail channel, tenders of various kinds are becoming increasingly important in all other channels. Such tenders are sometimes for the whole battery category or the whole store and thus, if a competitor is not able to supply hearing aids batteries, such could not appropriately compete for the tender.*' [52]

(86) Fifth, contrary to what the Notifying Party argues, the market investigation indicated that the Merged Entity would be able to identify HABs that its customers eventually sell in the EEA and to price discriminate between HABs sold in different regions of the world. Therefore, in case of input foreclosure of EEA customers, the Merged Entity loss of profits would be limited to those HABs ultimately sold to the EEA markets. This is for the following reasons.

(87) In the first place, HABs manufactured for the EEA market have some distinguishable features in terms of technical specifications and packaging. A market participant explains: '*Battery labels and packaging should need to be adapted to the European requirements in terms of safety warnings, language translations, disposal advice.*'[53]

(88) In the second place, it has been suggested in the market investigation that VAG would have the ability to monitor where its customers ultimately sell their products. A market participant explains: '*There is no monitoring per se of the sales we make in the non-audiologist channel today as we acquire the products manufactured as private label goods for us and then could freely resell them in Europe and Africa. However, VAG has certainly good market knowledge and probably tracks general market share and presence through external sources like Nielsen, etc.*'[54]

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52 Minutes of a call with a market participant.

53 Minutes of a call with a market participant.

54 Questionnaire to battery companies, question 8.

(89) Therefore, the Commission considers that the Merged Entity would likely have the incentive to engage in input foreclosure relating to the manufacture and supply of white label HABs to battery brands as such a behaviour would likely be profitable to it.

4.3.4.3. Overall impact

(90) A merger can raise competition concerns if input foreclosure would lead to a price increase in the upstream market.[55] The higher the proportion of the proportion of the rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein.[56]

(91) For the following reasons, the Commission considers that input foreclosure by VAG post-Transaction would have an overall impact in the market.

(92) First, the Merged Entity's input foreclosure would impact a large part of its competitors and a significant share of overall supply in the downstream market for the wholesale supply of branded HABs to the mass retailer channel. As already explained in Section xxx, all but one major downstream competitor in the EEA – Energizer – relies on HABs manufactured by VAG. As set out in Table 4, even if the analysis of the market were carried out on the wider EEA level,[57] the cumulated market shares of the Parties' downstream competitors excluding Energizer is [40-50]% in volume and [30-40]% in value.

(93) Second, in case of input foreclosure, only Energizer would be able to produce, as a vertically integrated player, adequate alternative HABs. All the main companies active downstream, excluding Energizer, are fully dependant on the supply of HABs by VAG. Therefore, in case of input foreclosure, the Merged Entity would have to compete only with Energizer in the downstream market for the wholesale supply and distribution of branded HABs to the mass retailer channel. Moreover, by itself the foreclosure will be profitable for VAG as explained in paragraphs (76) to (88).

(94) Third, the result of an input foreclosure behaviour by the Merged Entity would lead to a literal duopoly at the downstream market, conducive to higher prices than a market with more market participants. In a question to Herbert Schein, Chairman of the Executive Board of VARTA AG during an investor call an analyst states: '*exclusive supply and licence agreement for Rayovac-branded hearing aid batteries produced in the UK and the US. Those are batteries from your direct competitor and you have a majority market share in what is almost a duopoly in Europe'.* [58]

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55 Non-horizontal Mergers Guidelines, paragraph 47.

56 Non-horizontal Mergers Guidelines, paragraph 48.

57 Although the geographic market definition is national-wide, an EEA-wide assessment complements the national analysis and provides a better overview of the cumulated impact of the input foreclosure on each of the EEA markets.

58 Reply to RFI 17, 'VARTA AG Update Call 29 May 2019, 10:00 am CEST'.

4.3.5. Conclusion on input foreclosure

(95) For the reasons set out in Section 4.3.4 and considering all evidence available to it, the Commission concludes that, post-Transaction, VAG would likely have the ability and incentive to engage in input foreclosure, and that such foreclosure would have an overall impact in the downstream market for the wholesale supply of branded HABs to the mass retail channel.

(96) The Transaction, as notified, thus raises serious doubts as to its compatibility with the internal market due to an input foreclosure related to the vertical link between (i) the upstream market for the manufacture and supply of white label HABs to battery brand businesses and (ii) the downstream market for the supply of branded HABs to the mass retail channel.

5. VAG'S MARKET POWER IN OTHER MARKETS

(97) During the market investigation, one market participant expressed a concern that the Transaction would increase VAG's market power overall in batteries. According to this market participant, such an overall market power would allow VAG to foreclose its customers in markets that are not affected by the Transaction. More specifically, this market participant is concerned that VAG might stop supplying or supplying at less favourable conditions rechargeable batteries for hearing aid devices.[59]

(98) Nonetheless, the information made available to the Commission does not allow the conclusions that the Transaction would give rise to such competition concern. Moreover, as this market participants explained, the Divestment Business is not active in the supply of rechargeable batteries for hearing aids. Therefore, post-Transaction, the incentives and ability of VAG to foreclose its customers in these markets would likely not change materially. Accordingly, the Commission does not consider that the Transaction would raise serious doubts with respect to rechargeable hearing aid batteries.

6. PROPOSED REMEDIES

6.1. Introduction

(99) On 12 November 2019 the Notifying Party submitted commitments ('Initial Commitments'), pursuant to Article 6(2) of the Merger Regulation, in order to remove the serious doubts identified by the Commission and to render the Transaction compatible with the internal market and the functioning of the EEA Agreement.

(100) On 13 November 2019, the Commission launched a market test on the Initial Commitments.

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[59] Minutes of a call with a customer on 27 November 2019.

(101) On 21 November 2019, the Commission reported to the Notifying Party on the results of the market test.

(102) On 25 November 2019, the Notifying Party submitted revised commitments, which they resubmitted in a clarified version on 2 December 2019 ('Final Commitments').

6.2. Initial Commitments

6.2.1. Description of the Initial Commitments

(103) The Initial Commitments consisted of the Notifying Party committing to supply HABs globally to any undertaking currently or potentially active in the wholesale supply of HABs under its own brand, such brand being used for batteries of any kind or for hearing aid devices, provided that the customer would purchase a certain minimum volume of HABs from the Notifying Party.

(104) The term of the supply obligation under the Initial Commitments was set to ten (10) years from the Commission's decision. However, any supply agreements with customers would have been made for an initial five-year term (in maximum up to the ten years from the Commission's decision) whereafter a monitoring trustee would have annually reviewed the need to extend the agreement with the particular supplier, given the prevailing market situation at that time.

(105) The Initial Commitments further set other key terms of the supply, among others price, volumes and quality. As to price, the Initial Commitments provided a ceiling price based on the prices previously charged from a given customer or, in case of a new customer, based on the prices charged for existing customers, such ceiling prices being subject to annual indexation on the basis of inflation and other rules set out in the Initial Commitments. As to volumes, a threshold was set in the Initial Commitments at 120% of the volumes supplied to a given customer in the preceding year, with the possibility for a monitoring trustee to review requests for any excess quantities. As to quality, the Initial Commitments provided certain standards that the HABs to be supplied by the Notifying Party would need to fulfil and certain further guarantees of a maintained quality.

(106) Further, the Initial Commitments provided for an obligation for the Notifying Party to supply any possible new products that it might start to produce during the term of the Initial Commitments.

6.2.2. Notifying Party's position

(107) According to the Notifying Party, the Initial Commitments are clear-cut and they would eliminate any serious doubts of competition concerns related to the Transaction.[60]

[60] Form RM.

6.2.3. Results of the market test

(108) On balance, the results of the market test were positive and they suggest that the Initial Commitments are in principle capable of the removing the serious doubts identified by the Commission.

(109) In particular, the majority of market participants taking a position submit that the Initial Commitments would ensure their continued access to HABs in adequate volumes and reasonable terms.[61] The results of the market test further show that most market participants responding do not expect significant increases in the overall market demand and, even the market participant that is expecting demand increases, expect them to be at most in line with the 120% threshold or lower.[62]

(110) Further, the results of the market test suggest that the term of the Initial Commitments are adequate to ensure that customers currently active in the wholesale of branded HABs to the mass retail channel can develop alternative supply sources for HABs of adequate quality before the end of the duration of the Initial Commitments.[63]

(111) Finally, multiple market participants indicated that they would be interested in entering into a supply agreement with the Notifying Party under the terms set out in the Initial Commitments either as they are, or subject to certain limited amendments.[64]

(112) Nonetheless, market participants referred to a limited number of technical clarifications and improvements to the Initial Commitments that they suggested were necessary to ensure the effectiveness of the remedies. The clarifications and improvements mentioned relate to for example indexation of the price, packaging options made available and an explicit confirmation that – in order to achieve adequate volumes – customers can sell the HABs sourced from the Notifying Party to any downstream customer including those not active in the mass retail channel.[65]

6.2.4. Commission's assessment

(113) The Commission considers that the Initial Commitments are in principle capable of removing the serious doubts raised by the Transaction. This is because:

(114) First, the Final Commitments cover supplies to all existing customers as well as to any potential new entrants that are active in nearby markets such as batteries or hearing aid devices. The Commission considers that the inclusion in the Initial Commitments of all current suppliers as well as any potential supplier already active in nearby markets increases the likelihood that competitive conditions in the downstream market are not made worse because of the Transaction.

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61 See for example replies to questions 1, 4, 10 and 11 of the Market Test.
62 Replies to question 8 of the Market Test.
63 Replies to question 3 of the Market Test.
64 Replies to question 2 of the Market Test.
65 See for example replies to questions 1, 4, 5, 9, 11 and 20 of the Market Test.

(115) Second, the results of the market investigation are overall positive. As explained in Section 6.2.3 , market participants see that the Initial Commitments would ensure that the Initial Commitments would ensure a continued access to HABs in adequate volumes and at reasonable terms, including price and quality.

(116) Third, the term of the Initial Commitments and the duration of the supply obligation on the Notifying Party appears adequate to allow customers to develop alternative supply sources, for example by working with the suppliers whose quality at present is not adequate. This is also in line with the replies to the market test explained in Section 6.2.3. The Commission further considers that it is in order to incentivise customers to seek alternative supply sources without delay and not to unduly rely on the commitments for longer than necessary. This purpose appears to be adequately served by the fact that the supply agreements are initially concluded for five years instead of the whole duration of the Initial Commitments (10 years), and that extensions are subject to a review.

(117) Fourth, it appears that the volume thresholds set in the Initial Commitments are adequate to ensure that the Notifying Party is obliged to supply HABs not only in line with the overall market growth but to allow for market share growth by its downstream competitors in the supply of branded HABs to the mass retail channel. In particular, the Initial Commitments provide that the Notifying Party shall supply a given customer with at least 120% of the customer's demand in the previous year. This allows for a 20-% guaranteed supply increase every year compared to the previous, at the request of the customer. As explained in Section 6.2.3, market participants generally consider the volume threshold to be adequate, and market participants largely expect the overall market demand to grow less than the guaranteed 20-% annual increase in supplies set in the Initial Commitments. The threshold would thus allow customers to not only grow in line with overall expected market expansion but to gain market share.

(118) Fifth, the interest by market participants to enter into supply relationships with the Notifying Party under the conditions of the Initial Commitments, as explained in Section 6.2.3, supports the finding that the conditions of supply laid down in the Initial Commitments are suitable.

(119) Sixth, while the market test revealed some shortcomings in the Initial Commitments, they are not of such magnitude that they would call into question the suitability and effectiveness of the Initial Commitments to, in principle, remove the competition concerns the Commission has identified. The shortcomings relate to, for example, indexation of the ceiling price, the types of packaging that the customers could acquire the HABs with and clarification on how the volume threshold is calculated.

(120) Therefore, the Initial Commitments would in principle ensure that downstream competitors do not face disruptions, higher prices or reduced quality in the supply of hearing aid batteries they offer to customers while they develop alternative sourcing options. The commitments would also allow other companies to enter the market relying on similar supply conditions from the Notifying Party.

(121) Nonetheless, the Commission considers that the shortcomings referred to by market participants in the market test, even if limited, relate to key conditions of supply such as price, packaging and volumes. They must thus be addressed in order for the commitments to be effective from all points of view.

6.2.5. Conclusion on the Initial Commitments

(122) Based on the considerations explained in 6.2.4 and in light of the results of the market test and all information available to it, the Commission concludes that the Initial Commitments were in principle capable of removing the identified serious doubts, subject to implementation of the necessary improvements identified.

6.3. Final Commitments

6.3.1. Description of the Final Commitments

(123) The Final Commitments, provide the following improvements over the Initial Commitments:

- The annual indexation of the ceiling price was amended based on the feedback from the market test;
- An amendment was added to clarify that the Notifying Party will supply customers with all types of packaging it uses in its own downstream businesses;
- A clarification was added to explain customers are allowed to see the HABs supply by the Notifying Party in any downstream sales channel (including to mass retail but to others as well), and that the volume thresholds are calculated on the basis of such total supplies; and
- Certain other technical amendments and clarifications were added.

6.3.2. Commission assessment and conclusion on the Final Commitments

(124) The Commission notes that the Final Commitments address all the issues identified in the Initial Commitments and put forward the improvements found necessary by the Commission.

(125) Overall, the Final Commitments ensure that downstream competitors do not face disruptions, higher prices or reduced quality in the supply of hearing aid batteries they offer to customers while they develop alternative sourcing options. The commitments also allow other companies to enter the market relying on similar supply conditions from the Notifying Party. The Final Commitments also ensure that customers can acquire the HABs with all types of packaging used by the Notifying Party itself, and that the customers are able to acquire adequate volumes of HABs from the Notifying Party and to sells them in any downstream channel.

(126) Therefore, the Final Commitments entered into by the Notifying Party are suitable and sufficient to remove the competition concerns identified by the Commission and

to thus eliminate the serious doubts as to the compatibility of the Transaction with the internal market.

7. CONDITIONS AND OBLIGATIONS

(127) The commitments in section B of the Annex constitute conditions attached to this decision, as only through full compliance therewith can the conditions of competition be preserved. The other commitments set out in the Annex constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

8. CONCLUSION

(128) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the Final Commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

(129) This decision is without prejudice to the Commission's approval of VAG as a suitable purchaser of the Divestment Business in the case M.8988 – *Energizer/Spectrum Brands* and of the Commission's assessment of whether the terms of the divestiture are consistent with the Commission's decision and the commitments in that case.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

Dated 2 December 2019

Non-confidential version

Varta Aktiengesellschaft

CASE NO M.9449 — VAG / Varta (Consumer Battery, Chargers and Portable Power and Lighting Business)

Commitments to the European Commission

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (***Merger Regulation***), VARTA Aktiengesellschaft and any of its Affiliated Undertakings (***VAG*** or ***Notifying Party***) hereby enters into the following Commitments (***Commitments***) vis-à-vis the European Commission (***Commission***) with a view to rendering the acquisition by VAG of sole control of Varta Consumer Battery, Chargers and Portable Power and Lighting Business (***Varta Business***) (***Concentration***) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 6(1)(b) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (***Decision***), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (***Remedies Notice***).

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Notifying Party and/or by the ultimate parents of the Notifying Party, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "***Consolidated Jurisdictional Notice***").

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

Customer: any undertaking currently or potentially active in the wholesale supply of HAB under its own brand (**Customer Own-Branded HAB**), such brand being used for batteries of any kind or for hearing aid devices. Undertakings failing to satisfy annual Product purchases of at least

three million Customer Own-Branded HAB and failing to resell substantial part of them in the EEA do not qualify as Customers.

Customisation: the process through which Customers may obtain from the Notifying Party Product customisation, including with respect to packaging and specification on terms specified in the Supply Agreement. For the avoidance of doubt, with respect to packaging, Customers shall be free to demand either customised packaging options in accordance with established market standards or any packaging option sold by the Notifying Party.

Effective Date: the date of the adoption of the Decision.

Excess Quantities: the amount of Products exceeding 120% of the Notifying Party's volumes of Products actually supplied further to the Supply Agreement with any given Customer during the prior fiscal year, or in case of Existing Customers, the amount exceeding 120% of Notifying Party's volumes of Products actually supplied in the fiscal year preceding entering into the Supply Agreement, with such 120% threshold set on a rolling annual basis during the Term. To the extent the Notifying Party sells Products on its own account under a licence agreement entered into with the Customer and the Customer intends to sell those Products under its own brand because of termination or expiry of the license or other cause, those quantities shall not be considered Excess Quantities. Those volumes, even if sold by the Notifying Party under license, shall be accounted together with Products actually supplied when computing the 120% threshold for Excess Quantities.

HAB: primary batteries for use in hearing aid devices (as opposed to other consumer batteries).

Indexation – the Supply Agreement will allow for the Notifying Party and a Customer to negotiate in good faith for the Price to be adjusted at the end of each consecutive period of 12-months following the conclusion of the Supply Agreement in order to reflect significant increases or decreases in its cost base (for example, due to an increase in raw material prices, development or labour costs or to adequately reflect Customer-specific efficiencies and changes in Customisation). The Monitoring Trustee will, subject to consultation with the Commission, determine whether any such adjustment is reasonable. Further, to compensate for the innovation expenses and costs the Notifying Party had to incur to develop the New Products from which Customer will benefit, the Price shall be reasonably increased by Notifying Party; the Monitoring Trustee has to approve such increased Price for New Products, subject to consultation with the Commission and taking into account whether the benefit of the innovation objectively justifies the Price increase. In consultation with the Commission, the Monitoring Trustee shall also determine, whether such adjustment reasonably reflects a decrease of costs that may arise due to the introduction of a certain innovation.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Party, and who has/have the duty to monitor the Notifying Party's compliance with the conditions and obligations attached to the Decision.

New Products: HAB similar to the Products, in relation to which quality or functionality has been changed, provided that the change in quality or functionality is used by the Notifying Party in any of the HAB manufactured by it.

Price: the ceiling price at which the Products are offered to be sold to the Customer, which shall be the average per-unit price at which the Notifying Party (directly and indirectly) supplied the Customer the Products during the period immediately preceding the conclusion of the Supply Agreement with the Customer of either: (i) the last 12-months; or (ii) the last three years (**Existing Customers**), whichever is more favourable for the Customer. For Customers who have not been supplied by the Notifying Party for periods of at least three years immediately preceding the conclusion of the Supply Agreement (**New Customers**), the Notifying Party shall submit a proposed Price determined on *bona fide* and non-discriminatory commercial conditions to the Monitoring Trustee. The Monitoring Trustee shall, subject to consultation with the Commission, assess the issue taking into account the conditions offered to Existing Customers (including Customisation and volumes) and make a determination of the Price. The Notifying Party shall disclose to the Monitoring Trustee all necessary information for such determination. With respect to Excess Quantities, the Price shall be set further to good faith discussions between the Notifying Party and the Customer, taking into account any potential cost increase involved in supplying such Excess Quantities.

Products: HAB manufactured by VAG as defined, specified and/or supplied further to the Supply Agreement. New Products, should these be developed during the Term, will be included as Products.

Supply Agreements: the agreements to be entered into between the Notifying Party and the Customer, according to which the Notifying Party shall be obliged to supply the Products to the Customer during the Supply Agreement Term. The Notifying Party shall agree on a form of the Supply Agreement with the Monitoring Trustee, subject to consultation with the Commission. Any material deviations from the Supply Agreements shall be approved by the Monitoring Trustee, subject to consultation with the Commission.

Supply Agreement Expiry: termination or expiry of the Supply Agreement Term or the absence of the Supply Agreement Term, upon expiry, being further extended. As part of the Initial Review and of each Subsequent Review (if any), the Monitoring Trustee shall, subject to consultation with

the Commission, compile a report containing a recommendation as to whether Supply Agreement Expiry should take place, taking into account the prevailing competitive dynamics at the time.

Supply Agreement Term: the term of any given Supply Agreement, commencing as from the **Supply Agreement Commencement Date** for an initial period of 5 years. The Supply Agreement Term shall be first reviewed by the Monitoring Trustee 5 years after the Supply Agreement Commencement Date (**Initial Review**). Provided that, following the Initial Review, Supply Agreement Expiry has not taken place, the Supply Agreement Term of the Supply Agreement in question shall be extended by one year. Further reviews by the Monitoring Trustee (**Subsequent Reviews**) are to be carried out starting 6 years after the Supply Agreement Commencement Date and at yearly intervals thereafter, the last Subsequent Review being possible 9 years after the Supply Agreement Commencement Date provided that, at each Subsequent Review, Supply Agreement Expiry may take place under the circumstances set out herein. For the avoidance of doubt, the duration of the Supply Agreement Term may in no circumstances extend beyond the Term or the duration of the Commitments, if shorter than the Term, and may be subject to termination or expiry as specifically provided for in the Supply Agreement. The Monitoring Trustee's reports shall be submitted in a timely manner, allowing the Commission a period of three months for its consideration.

Supply Shortage: any situation in which the Notifying Party is unable to produce or supply sufficient quantities of Product to fulfil its obligations under the Supply Agreements.

Term: the period of 10 years following the Effective Date.

Territory: global.

Section B. Description of Commitments

2. The Notifying Party undertakes that, during the Term, it will supply under the Supply Agreement in the Territory the Products to the Customer on reasonable and non-discriminatory commercial terms at the Price. Supply Agreements shall provide for the possibility of Indexation and Customisation. For the avoidance of doubt, all Customers shall have the option of safeguarding the terms they might have agreed with the Notifying Party prior to the Effective Date or of freely negotiating with the Notifying Party terms which deviate from those set out herein. To the extent the Notifying Party sells Products on its own account under a licence agreement entered into with the Customer and the Customer intends to sell those Products under its own brand because of termination or expiry of the licence or other cause, those quantities shall be covered by the Supply Agreement.

3. In the event that a Customer requests to purchase Excess Quantities and the fulfilment of such request would impose unreasonable costs on the Notifying Party, the Notifying Party commits to discuss with the Customer in good faith, in consultation with the Monitoring Trustee a means of resolving such supply request. If the Notifying Party and the Customer do not reach an agreement, the Monitoring Trustee will, subject to consultation with the Commission, determine whether the supply request for Excess Quantities shall be fulfilled, in full or in part, with the Monitoring Trustee taking into account the reasonableness of the request of the Customer, any capacity constraint encountered by the Notifying Party and any additional necessary and non-discriminatory expenditures that may be imposed on the Customer in the fulfilment of such request.

4. The Notifying Party shall not do or fail to do anything that will knowingly and significantly degrade the quality of the Product in comparison to: (i) the quality of HAB supplied through its own wholesale distribution and; (ii) the quality requirements according to leading industry standards, in particular the internationally accepted standards set by the International Electrotechnical Commission under IEC 60086-2 and IEC 60086-1, as amended from time to time.

5. In case of a Supply Shortage, Notifying Party shall provide the Products to the Customers in priority to servicing the Notifying Party's own requirements. In such case, an allocation methodology for the Products to each of the Customers and the Notifying Party shall be established by the Monitoring Trustee in consultation with the Commission.

6. The Notifying Party commits to put in place internal information barriers with a view to establishing a separation between its hearing aid battery related activities upstream (i.e., VAG's HAB supplies to the Customers) and its hearing aid battery related activities downstream (i.e., VAG's HAB supplies to retailers, wholesalers and distributors other than the Customers) (**Information Barrier**).

7. The Notifying Party undertakes that it will not make the supply of Products subject to acceptance by the Customer of supplementary obligations which by their nature and according to commercial usage have no connection to the subject of the Supply Agreement (**Non-Tying Obligation**).

Section C. Monitoring Trustee

I. <u>Appointment procedure</u>

8. The Notifying Party shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.

9. The Monitoring Trustee shall:

   (i) at the time of appointment, be independent of the Notifying Party;

   (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and

   (iii) neither have nor become exposed to a Conflict of Interest.

10. The Monitoring Trustee shall be remunerated by the Notifying Party in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Notifying Party

11. No later than two weeks after the Effective Date, the Notifying Party shall submit a list of one or more persons whom the Notifying Party proposes to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements as set out in paragraph 9 and shall include:

    a. the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments;

    b. the outline of a work plan, which shall describe how the Monitoring Trustee intends to carry out its duties under these Commitments.

Approval or rejection by the Commission

12. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, the Notifying Party shall appoint or cause to be appointed the individual or institution concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name are approved, the Notifying Party shall be free to appoint the Monitoring Trustee from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Notifying Party

13. If all the proposed Monitoring Trustees are rejected, the Notifying Party shall propose at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraph 8 to 12 of these Commitments.

Monitoring Trustee nominated by the Commission

14. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom the Notifying Party shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Monitoring Trustee

15. The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or the Notifying Party, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

16. The Monitoring Trustee shall:

(i) monitor the execution and implementation of the Supply Agreements and ensure that the rights and obligations arising under the Supply Agreements, including with respect to matters such as pricing, quality, quantities and other key parameters, are determined and carried out in fully compliance with the Commitments;

(ii) propose to the Notifying Party such measures as the Monitoring Trustee considers necessary to monitor and ensure the Notifying Party's compliance with the conditions and obligations with respect to the Information Barrier and Non-Tying Obligations;

(iii) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;

(iv) propose to the Notifying Party such measures as the Monitoring Trustee considers necessary to ensure the Notifying Party's compliance with the conditions and obligations attached to the Decision;

(v) act as a contact point for any requests by third parties, in particular the potential Customers, in relation to the Commitments;

(vi) promptly report in writing to the Commission, sending the Notifying Party a non-confidential copy at the same time, if it concludes on reasonable grounds that the Notifying Party is failing to comply with these Commitments;

(vii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

III. Duties and obligations of the Parties

17. The Notifying Party shall provide and shall cause its advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Notifying Party shall make available to the Monitoring Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

18. The Notifying Party shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request and provide the Monitoring Trustee with access to any documents and records that the Monitoring Trustee may require in carrying out its duties.

19. The Notifying Party shall indemnify the Monitoring Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Notifying Party for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.

20. At the expense of the Notifying Party, the Monitoring Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Notifying Party's approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should the Notifying Party refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard the Notifying Party. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 19 of these Commitments shall apply *mutatis mutandis*.

21. The Notifying Party agrees that the Commission may share Confidential Information proprietary to the Notifying Party with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

22. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.

23. For a period of 10 years from the Effective Date, the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

III. Replacement, discharge and re-appointment of the Monitoring Trustee

24. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including its exposure to a Conflict of Interest:

    a. The Commission may, after hearing the Monitoring Trustee, require the Notifying Party to replace the Monitoring Trustee; or
    b. The Notifying Party, with the prior approval of the Commission, may replace the Monitoring Trustee.

25. If the Monitoring Trustee is removed according to paragraph 24, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has affected a full hand-over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to paragraphs 8 to 14.

26. Unless removed according to paragraph 24, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have lapsed. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments might not have been fully and properly implemented.

Section D. Arbitration

27. In the event that the Customer claims that the Notifying Party is failing to comply with the requirements of the Commitments described in paragraphs 2 to 7 above, the Customer may choose to utilise the fast track dispute resolution procedure as described in this Section.

Fast Track Dispute Resolution

28. If the Customer wishes to avail itself of the fast track dispute resolution procedure, it shall send a written request to the Notifying Party (with a copy to the Monitoring Trustee) setting out in detail the reasons leading the Customer to believe that the Notifying Party is failing to comply with the requirements of these Commitments. The Customer and the Notifying Party will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through cooperation and consultation within a reasonable period of time not exceeding fifteen (15) working days after receipt of the request.

29. The Monitoring Trustee shall present its own proposal (**Trustee Proposal**) for resolving the dispute within seven (7) working days, specifying in writing the action, if any, to be taken by the Notifying Party in order to ensure compliance with the Commitments vis-à-vis the Customers, and be prepared, if requested, to facilitate the settlement of the dispute.

30. Should the Customer and the Notifying Party (together **Parties to the Arbitration**) fail to resolve their differences of opinion in the consultation phase, the Customer shall serve a notice (**Notice**), in the sense of a request for arbitration, to the ICC (**Arbitral Institution**) with a copy of such Notice to the Notifying Party.

31. The Notice shall set out in detail the dispute, difference or claim (**Dispute**) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the Notifying Party.

32. The Notifying Party shall, within ten (10) working days from receipt of the Notice, submit its answer (**Answer**), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the Notifying Party proposes to undertake *vis-à-vis* the Customer.

Appointment of the Arbitrators

33. The Arbitral Tribunal shall consist of three (3) persons. The Customer shall nominate its arbitrator in the Notice; the Notifying Party shall nominate its arbitrator in the Answer. The arbitrators nominated by the Customer and by the Notifying Party shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three (3) arbitrators. The three-person arbitral tribunal is herein referred to as the **Arbitral Tribunal**.

34. Should the Parties to the Arbitration fail to nominate an arbitrator, or if the two (2) arbitrators fail to agree on the chairman the default appointment(s) shall be made by the Arbitral Institution.

Arbitration Procedure

35. The Dispute shall be finally resolved by arbitration under the rules of the Arbitral Institution, with such modifications or adaptations as foreseen herein or necessary under the circumstances (**Rules**). The Arbitration shall be conducted in Frankfurt, Germany, in the English language.

36. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

37. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.

38. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure.

39. The Arbitral Tribunal shall not disclose Confidential Information and apply the standards attributable to Confidential Information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to Confidential Information to the Arbitral Tribunal, the Monitoring Trustee and outside counsel and experts of the opposing party.

40. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Customer must produce evidence of a prima facie case and (ii) if the Customer produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Customer unless the Notifying Party can produce evidence to the contrary.

Involvement of the Commission

41. The Commission shall be allowed and enabled to participate in all stages of the procedure by:

    i. Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;

    ii. Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of reference and procedural timetable);

    iii. Having the opportunity to file *amicus curiae* briefs; and

    iv. Being present at the hearing(s) and being allowed to ask questions to the Parties to the Arbitration, witnesses and experts.

42. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

43. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

44. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by these Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and the general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.

45. Upon request of the Customer, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.

46. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by the Notifying Party in order to comply with these Commitments *vis-à-vis* the Customer (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful Party to the Arbitration and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

47. The final award shall, as a rule, be rendered within six (6) months after the date of the terms of reference. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of these Commitments if asked by the Arbitral Tribunal.

48. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

Section E. The review clause

49. The Commission may extend the time periods foreseen in the Commitments in response to a request from the Notifying Party or, in appropriate cases, on its own initiative. Where the Notifying Party requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause**.** This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall the Notifying Party be entitled to request an extension within the last month of any period.

50. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in the Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the

undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section F. Entry into force

51. The Commitments shall take effect upon the date of adoption of the Decision.

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duly authorised for and on behalf of

VARTA Aktiengesellschaft